RECENT DECISIONS.

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ACTION FOR PENALTY—ASSESSMENT OF PENALTY BY THE COURT.—The trial judge determined the sum to be recovered by the government under a penal statute providing for a maximum and minimum penalty. *Held,* no error. *Missouri K. & T. Ry.* v. *United States* (U. S. Sup. Ct. 1913). Not yet reported.

The federal courts have always shown a tendency to regard an action for a penalty as similar in many respects to a criminal prosecution. For this reason the Supreme Court will not take original jurisdiction in such an action brought by one state against a citizen of another state. *Wisconsin* v. *Pelican Ins. Co.* (1887) 127 U. S. 265. The defendant cannot be compelled to testify; *Boyd* v. *United States* (1885) 116 U. S. 616; his guilt must be established beyond a reasonable doubt; *Chaffee* v. *United States* (1873) 18 Wall. 516; *United States* v. *Shapleigh* (C. C. A. 1893) 54 Fed. 126; *contra, United States* v. *Southern Pac. Co.* (D. C. 1908) 162 Fed. 412; and a prior criminal adjudication will bar a subsequent suit on the penalty under the principle of double jeopardy. *United States* v. *McKee* (C. C. 1877) 4 Dill. 128; *cf. Coffey* v. *United States* (1885) 116 U. S. 436; see 13 Columbia Law Rev. 529. On the other hand, the defendant in such suit has not the right of confrontation, *United States* v. *Zucker* (1895) 161 U. S. 475, and the court may direct a verdict against him. *Hepner* v. *United States* (1908) 213 U. S. 103. These contradictions are not so noticeable in the state courts, where the civil character of such suits is emphasized, *Grenada Lumber Co.* v. *State* (1910) 98 Miss. 536, although the differences in the various statutes must not be neglected. So the doctrine of double jeopardy is held not applicable, *People* v. *Snyder* (N. Y. 1904) 90 App. Div. 422, and a preponderance of evidence will sustain a conviction, *People* v. *Proctor* (1887) 24 Ill. App. 599; *People* v. *Briggs* (1889) 114 N. Y. 56, while the amount of the penalty is left to the jury. *People* v. *Hartford Life Ins. Co.* (1911) 252 Ill. 398; *McDaniel* v. *Gate City Co.* (1887) 79 Ga. 58. It is submitted, however, that since these statutes are deterrent and not remedial in their nature and purpose, the amount of the penalty is based on the heïnousness of the offense rather than on the damage accruing to the injured party. See *A. T. & S. F. R. R.* v. *United States* (C. C. A. 1910) 178 Fed. 12. There is, therefore, no question which could properly be left to a jury. *United States* v. *Southern Pacific Co., supra.*

ACTIONS—ACCRUAL.—Defendant in the construction of a bridge embankment left such insufficient openings for the passage of a creek that the plaintiff's lands were flooded after an ordinary rainfall. *Held,* though the injury was permanent, as treated by the parties, the right of action accrued when the plaintiff was able to discover by the use of reasonable diligence that the market value of her property had been diminished. *Chesapeake etc. Ry.* v. *Robbins* (Ky. 1913) 157 S. W. 903.

When a structure inflicting damage is temporary, the presumption being in favor of its removal, no cause of action accrues until injury is actually done by it, *Peden* v. *Chicago etc. Ry.* (1889) 78 Ia. 131, but if it be permanent and its construction and maintenance neces-

sarily an injury, an action for all damages is available upon its erection, *St. Louis etc. Ry.* v. *Morris* (1880) 35 Ark. 622, and if the harm was discoverable at the time the structure was built, the injured party cannot object, on a plea of the Statute of Limitations, that his damage was, at that time, incomplete. *Powers* v. *St. Louis etc. Ry.* (1900) 158 Mo. 87; see *Powers* v. *City of Council Bluffs* (1877) 45 Ia. 652; but see *King* v. *United States* (C. C. 1893) 59 Fed. 9. This principle, however, should not be permitted to work injustice to the plaintiff through the Statute, for there is a distinction between the mere abstract invasion of a right, and an actual interference with the enjoyment of property. See note to *Gulf etc. Ry.* v. *Moseler* (C. C. A. 1908) 20 L. R. A. 886. Since the latter is unquestionably the gravamen of the plaintiff's action, when the damage is uncertain and contingent, or the continuance of the structure not of necessity harmful, *St. Louis etc. Ry.* v. *Biggs* (1889) 52 Ark. 240; see *Railway Co.* v. *Yarborough* (1892) 56 Ark. 612, the cause of action for any resulting injury accrues not when the causes are first put in motion, but when the existence of that injury can be first ascertained. *Henry* v. *Ohio River R. R.* (1895) 40 W. Va. 234; *Culver* v. *Chicago etc. Ry.* (1889) 38 Mo. App. 130.

ALTERATION OF INSTRUMENTS—AFFIXING NAME OF WITNESS—CHATTEL MORTGAGE.—The defendant executed a mortgage to the plaintiff, who agreed not to record it. Thereafter, the plaintiff, without the knowledge or consent of the defendant, secured a notary public to attest the mortgage. *Held,* this was not a material alteration and the mortgage was not invalidated. *International Harvester Co.* v. *Davis* (Ga. 1913) 78 S. E. 770.

The authorities substantially agree that the insertion of the signature of an attesting witness in an instrument, subsequent to its execution and without the knowledge or consent of the maker, is a material alteration, which will avoid the instrument, *Brackett* v. *Mountfort* (1834) 11 Me. 115; *White Sewing Machine Co.* v. *Saxon* (1898) 121 Ala. 399, 408, on the ground that such attestation has the effect of extending the maker's liability under the Statute of Limitations, *Homer* v. *Wallis* (1814) 11 Mass. 309; *Brackett* v. *Mountfort, supra,* or that it furnishes a new and distinct medium of proof of the execution of the instrument. *Marshall* v. *Gougler* (Pa. 1823) 10 Serg. & R. 164. The cases in apparent conflict are distinguishable because the attestation of an instrument does not, in such jurisdictions, interfere with or facilitate proof of its execution, nor does it change the legal effect. *Fuller* v. *Green* (1885) 64 Wis. 159; *Ford* v. *Ford* (Mass. 1835) 17 Pick. 418. The general rule has, in some instances, been qualified to the extent that a material alteration will not vitiate an instrument unless it is made with a fraudulent purpose. *Adams* v. *Frye* (Mass. 1841) 3 Metc. 103. To be sure, the addition of the name of the attesting witness to the mortgage in the principal case did not increase the mortgagor's liability, but the legal effect of the instrument was undoubtedly changed, since attestation is necessary for recording purposes. This would seem to argue for the materiality of the alteration, and the argument of the court that the mortgagor was fully protected by the mortgagee's agreement not to record the mortgage seems to have little validity.

ATTORNEY AND CLIENT—REPUDIATION OF CONTRACT OF EMPLOYMENT—COMPENSATION OF ATTORNEY.—Defendant gave intervener, an attorney, a bill of goods on his property as payment on a contract to bring

suit against the plaintiff, but abandoned his intention and discharged the intervener before institution of proceedings. In attachment proceedings by plaintiff as creditor of defendant, *held,* since the attorney was not discharged without cause, the contract was rescinded, and he might retain as against the attaching creditor only property equal to the value of his services. *Mesa County National Bank* v. *Berry* (Colo. 1913) 135 Pac. 129.

Since the employment of an attorney to prosecute litigation is an entire contract, *Gustine* v. *Stoddard* (N. Y. 1880) 23 Hun, 99, the weight of authority supports the doctrine, *Sessions* v. *Warwick* (1907) 46 Wash. 165; *contra, Scobey* v. *Ross* (1854) 5 Ind. 445, that the discharge of the attorney, provided he is without fault, *Walsh* v. *Shumway* (1872) 65 Ill. 471, is a waiver by the client of performance, *McElhinney* v. *Klein* (1878) 6 Mo. App. 94, entitling the attorney to the full sum specified, except where the agreement provides for a contingent fee. *French* v. *Cunningham* (1897) 149 Ind. 632. On the other hand, since the law favors settlements out of court, see *Western Union Tel. Co.* v. *Semmes* (1890) 73 Md. 9, the client should not be placed in the position of being forced to prosecute or continue any litigation, *Ellwood* v. *Wilson* (1866) 21 Ia. 523, and notwithstanding the difficulty of an adequate assessment of the value of his services, *Baldwin* v. *Bennett* (1854) 4 Cal. 392, the attorney should be left to his remedy in *quantum meruit.* See *Chevalier* v. *Doyle* (1911) 88 Neb. 560. Should the attorney be permitted to retain any compensation he may have received in advance, the client would be equally loath to settle outside of court, and public policy would therefore argue just as strongly for the return of the consideration. *Moore* v. *Robinson* (1879) 92 Ill. 491; *contra, Riehl* v. *Levy* (N. Y. 1904) 45 Misc. 425.

BANKRUPTCY—EXEMPT PROPERTY—SECTION 67f.—The bankrupt sued for his wages, which were exempt in Nebraska, the place of his residence, but which had been attached in Iowa, where such wages were not exempt. *Held,* he could recover. *Chicago, Burlington & Quincy R. R.* v. *Hall* (1913) 33 Sup. Ct. Rep. 885. See Notes, p. 64.

BANKRUPTCY—TITLE OF TRUSTEE—CONTINGENT REMAINDERS.—Property was devised in trust to A and his wife in fee, but in the event of the death of A and the remarriage of his wife, the trustees were directed to pay to the lawful children of A, or their descendants, all the estate so devised to A. Before the happening of the contingencies, one of the children assigned her whole interest under the will with intent to defraud creditors, and became bankrupt. *Held,* her remainder, whether vested or contingent, was an expectant estate, and passed to the trustee in bankruptcy. *Clowe* v. *Seavey* (N. Y. 1913) 102 N. E. 521. See Notes, p. 66.

CARRIERS—REBATING—MEASURE OF DAMAGES UNDER INTERSTATE COMMERCE ACT.—The plaintiff was charged a higher rate than another shipper for shipping goods under similar circumstances. *Held,* under the Interstate Commerce Act he could not recover the difference in rates as damages. *Pennsylvania R. R.* v. *International Coal Min. Co.* (1913) 33 Sup. Ct. Rep. 893. See Notes, p. 68.

CONSTITUTIONAL LAW—DEBT LIMITS.—An attempt was made to reduce the total debt of a state to within the debt limit by deducting the ap-

praised value of some state lands which were pledged to the payment of the debt. *Held,* this could not be done. *State Capitol Commission* v. *State Board of Finance* (Wash. 1913) 132 Pac. 861. See Notes, p. 70.

CONSTITUTIONAL LAW—POLICE POWER—DEPRIVATION OF PROPERTY.—A statute made the owner of a motor vehicle liable for any injury occasioned by the negligent operation of such vehicle by any person, unless it had been stolen. The plaintiff was injured by the defendant's motor car, which was being driven without the defendant's knowledge or consent. *Held,* in making the owner absolutely liable without fault on his part, the statute takes the property of the owner without due process of law. *Daugherty* v. *Thomas et al.* (Mich. 1913) 140 N. W. 615. See Notes, p. 73.

CONTRACTS—ALIMONY—AGREEMENT MADE OUT OF COURT.—In a suit for breach of contract to pay alimony, made while an action for divorce was pending, the defendant pleaded that the contract was void as against public policy. *Held,* since no collusion or fraud was pleaded, the contract was valid. *Maisch* v. *Maisch* (Conn. 1913) 87 Atl. 729.

In accordance with a well established policy of the law to favor marriage and discourage divorce, a contract between husband and wife, which requires divorce as a condition precedent to its enforcement, has usually been declared void even when no collusion was alleged. *Lake* v. *Lake* (N. Y. 1909) 136 App. Div. 47; *Muckenburg* v. *Haller* (1867) 29 Ind. 139; *contra, Burnett* v. *Paine* (1874) 62 Me. 122; *Burgess* v. *Burgess* (1903) 17 S. Dak. 44. The expediency of this rule is scarcely open to doubt when it appears from the facts that the effect of the contract is to encourage the parties to obtain the divorce, whether because of a tendency to interest the plaintiff in procuring it, or the defendant in foregoing resistance. See *Hamilton* v. *Hamilton* (1878) 89 Ill. 349. When, however, it is clear that the success of the plaintiff in the divorce proceedings was practically certain, and the probability of any collusion very slight, the courts would seem to be justified in declaring such contracts valid, in view of their tendency to prevent litigation. *Palmer* v. *Fagerlin* (1910) 163 Mich. 345; see *Randall* v. *Randall* (1877) 37 Mich. 563. The question, therefore, as to whether or not the contract is designed to facilitate divorce, should be determined, not by the fact that the decree was a condition precedent, but by a judicial investigation of the circumstances in each particular case. See *Palmer* v. *Fagerlin, supra.* The court, however, refused to invalidate the contract in the principal case, although undoubtedly contrary to public policy of their own jurisdiction, *Seeley's Appeal* (1888) 56 Conn. 202, because such an agreement was valid in the jurisdiction where it was made, *Burgess* v. *Burgess, supra,* and did not contravene any generally accepted moral standard.

CONVERSION—MITIGATION OF DAMAGES—RETURN OF PROPERTY.—After a levy in good faith but without tender of the amount of the mortgage debt, a sheriff returned mortgaged personal property to the possession and control of the mortgagee, who refused to receive it. *Held,* in the absence of proof of actual damage, only nominal damages could be awarded. *Whittier* v. *Sharp* (Utah 1913) 135 Pac. 112.

Save when the value of the property is unusually subject to fluctuation, or has no established market value, the rule of damages in an action for its conversion is its market value at the time and place of

conversion, 4 Sutherland, Damages (3rd ed.) § 1109, and the return of the property converted is no bar to the action. *Kerr* v. *Mount* (1864) 28 N. Y. 659. The right to damages being absolute upon the happening of the wrong, the court cannot compel the injured party to accept a return of the property, *Railroad Co.* v. *O'Donnell* (1892) 49 Oh. St. 489, though his agreement to do so, see *Y. M. C. A.* v. *Harmon* (1895) 61 Ill. App. 639, or his acceptance thereof in the absence of any agreement, *Yale* v. *Saunders* (1844) 16 Vt. 243, may be shown in mitigation of damages. But inasmuch as the true basis of all damages is compensation for the actual wrong done, it would seem that where the conversion is technical only, see *Ward* v. *Moffett* (1889) 38 Mo. App. 395, the action is simply a vindication of the right, see *Sutton* v. *Great Northern Ry. Co.* (1906) 99 Minn. 376, and where the trespass was not willful, see *Gilbert and Miller* v. *Peck* (1890) 43 Mo. App. 577, neither special injury nor oppressive conduct being shown, and the property was returned unchanged, unused and undamaged, *Bigelow Co.* v. *Heintze* (1890) 53 N. J. L. 69; but see *Kieffer* v. *Smith* (1903) 16 S. Dak. 433, or after a tender in good faith there was continued readiness to return, see *Ward* v. *Moffett, supra,* no more than nominal damages should be recovered. And, in accord with this view, it is, as in the principal case, inconceivable that a public ministerial officer, *Warder* v. *Baldwin* (1881) 51 Wis. 450, should be subjected to any greater liability in this respect than a private citizen.

CORPORATIONS—FRAUDULENT DISMISSAL OF ACTION—REINSTATEMENT AND CONTINUANCE BY STOCKHOLDERS.—A suit brought by a corporation for the cancellation of stock was fraudulently dismissed by the directors in collusion with the defendants. On application by the stockholders, the court set aside the dismissal, reinstated the action, made the stockholders parties plaintiff, and allowed them to continue the action. *National Power & Paper Co.* v. *Rossman* (Minn. 1913) 142 N. W. 818.

Assuming that the defendant had secured the issue of his stock by fraud, and that the directors had fraudulently refused to institute an action to cancel the shares, the stockholders could have maintained an action for that relief. Neither a release fraudulently given by the directors nor, it is submitted, a judgment of dismissal collusively obtained, as in the principal case, would be a defense to such a stockholders' action, see *Bissit* v. *Kentucky River Nav. Co.* (C. C. 1882) 15 Fed. 353, and note 360, which would seem to be their normal remedy. Like those plaintiffs, however, who bring actions in a representative capacity, the directors are bound to safeguard the interests of the corporation for whose benefit the action is really brought, and they have not the absolute right of dismissing the action. *Cf. State ex rel. City of Milwaukee* v. *Ludwig* (1900) 106 Wis. 226; see note to *Bissit* v. *Kentucky River Nav. Co., supra.* Thus, in the principal case, had the fraud been discovered earlier in the action the stockholders undoubtedly could have intervened to prevent the discontinuance and they would then have been entitled to continue the action; 3 Cook (6th ed.) Corporations, § 750; see *Eagle Iron Co.* v. *Colyar* (C. C. A. 1907) 156 Fed. 954; or under the present system of liberality of amendments, the stockholders can be introduced into the litigation even after judgment. *Henry* v. *Jeans* (1891) 48 Oh. St. 443, 456. Absolute justice, therefore, with considerable economy of time and money can be effected by allowing the stockholders to reinstate and continue the action. But this can be done, theoretically, only when, as in the principal case, the

cause of action is one which belongs to the corporation and which, on the directors' refusal to prosecute, the stockholders are entitled to enforce for the corporation.

EQUITABLE SET-OFF—SURETYSHIP—EXONERATION.—A executed a promissory note to the defendant, who, endorsing it, had it discounted. Before the maturity of this note, A sold the defendant lumber and assigned his claim for payment to C. The defendant seeks to set off against C the amount which he, as indorser, paid on the note after A, insolvent, had defaulted. *Held,* that the set-off was good against the assignee. *Nolan Bros. Lumber Co.* v. *Dudley Lumber Co.* (Tenn. 1913) 156 S. W. 465.

Since the defendant's payment in the principal case was made on a contingent liability which did not mature into a legal debt until after the assignment, it cannot be set off at law against the assignee. *Huse* v. *Ames* (1890) 104 Mo. 91. But natural equity demands that cross-claims be set off, see *Spurr* v. *Snyder* (1868) 35 Conn. 172, and if equity can once get jurisdiction, *cf. Hahn* v. *Gates* (1902) 102 Ill. App. 385; *Goodwin* v. *Keney* (1882) 49 Conn. 563, it will set off a claim not yet matured. *Kentucky Flour Co.* v. *Merchants' Nat. Bank* (1890) 90 Ky. 225; *Keightley* v. *Walls* (1866) 27 Ind. 384; *contra, Jeffryes* v. *Agra Bank* (1866) L. R. 2 Eq. 674. Even before a surety has been called upon to pay a matured debt, he has the right to a bill in equity, compelling his principal to discharge the debt. See *Keach* v. *Hamilton* (1899) 84 Ill. App. 413. Thus, where a note is due before the assignment of a claim against the surety, but not paid by the surety until after the assignment, the surety can protect himself against the insolvency of his principal by availing himself of this payment as an equitable set-off. *Merwin* v. *Austin* (1889) 58 Conn. 22; but see *Walker* v. *McKay* (Ky. 1859) 2 Metc. 294. There is, moreover, an inchoate right of exoneration even before the note falls due; since it is an equity between the original parties at the time of the assignment, the assignee should take subject to it; see 2 Pomeroy, Eq. Juris. (3rd ed.) § 704; and when it has finally been perfected, it should be available to the surety as an equitable set-off when the principal's insolvency would otherwise leave him remediless. See *Kentucky Flour Co.* v. *Merchants' Nat. Bank, supra; Keach* v. *Hamilton, supra.*

EASEMENTS—WAYS OF NECESSITY.—The plaintiff's land was cut off from the public highway by a cliff over which a road could not be constructed without an expenditure greatly disproportionate to the value of the land. *Held,* two judges dissenting, the plaintiff had acquired a way by necessity through the land of those who held under his grantor. *Crotty* v. *New River & Pocahantas Consol. Coal Co.* (W. Va. 1913) 78 S. E. 233.

Considerations of public policy seem originally to have been the grounds for conferring a right of way by necessity where a grant of land made no provision for access thereto. *Dutton* v. *Taylor* (1700) 2 Lutw. 1487. But the courts soon justified their action on the theory that the necessity furnished evidence that the parties must have intended that a means of access be granted. See *Warren* v. *Blake* (1866) 54 Me. 276; *Nichols* v. *Luce* (Mass. 1834) 24 Pick. 102. The reasoning based on the presumed intentions of the parties is often tempered by the very considerations of public policy which gave rise to this doctrine, for it has been held that the necessity need not

actually have existed at the time of the grant. See *Myers* v. *Dunn* (1881) 49 Conn. 71; but see *Corporation of London* v. *Riggs* (1880) L. R. 13 Ch. Div. 798. While some jurisdictions hesitate to extend the rule beyond the case where the grantee cannot reach his land without committing trespass, see *Fitchett* v. *Mellow* (1897) 29 Ont. Rep. 6, it would seem that if, in view of the topography, the enjoyment of the land is dependent on a certain method of access, courts should not refuse to raise an easement. While, therefore, mere inconvenience in the use of a road is not sufficient to give rise to a right of way, *Hildreth* v. *Googins* (1898) 91 Me. 227, an unreasonable expense in its construction might properly lead to the result in the principal case. See *Pettingill* v. *Porter* (Mass. 1864) 8 Allen, 1. It is questionable, however, whether the uncertainty involved in departing from the exact and precise terms of deeds is desirable, see *Warren* v. *Blake, supra,* where, as in many states, statutes exist compelling the establishment of appropriate private ways after proper compensation. Md. Code, Art. 25, §§ 100-115.

FRAUD—IMPOSTOR DEALING FACE TO FACE.—W. G., fraudulently representing himself to the plaintiff to be B. G., a man of good standing, obtained jewelry on credit, and sold it to the defendant for value. *Held,* plaintiff had passed title to the swindler. *Phelps* v. *McQuade* (N. Y. App. Div. 1913) N. Y. L. J., Nov. 7, 1913.

Two impostors, filing through a pay car with the defendant's employees, by announcing the names of two engineers obtained their checks from the paymaster, who countersigned them. *Held,* the railroad had not passed title to the impostors. *Simpson* v. *Rio Grande R. R.* (Utah 1913) 134 Pac. 883.

A sale of goods by correspondence to one impersonating another on whose credit the vendor relies, will ordinarily fail to pass title, because the vendor does not intend to sell to his unseen correspondent unless he turns out to be the person whom he represents himself to be. *Cundy* v. *Lindsay* (1878) L. R. 3 A. C. 459; see *Mercantile Nat. Bank* v. *Silverman* (N. Y. 1911) 148 App. Div. 1, 6. But when the dealings are face to face, the physical presence substitutes itself upon actual inspection for any supposed identification on which the seller may rely. *Edmunds* v. *Merchants' Despatch Co.* (1883) 135 Mass. 283; *Hickey* v. *McDonald* (1907) 151 Ala. 497; 3 Columbia Law Rev. 580. A difficulty arises when the person defrauded hands the impostor, not goods, but a check. The weight of authority again holds that this passes title and empowers the holder to do exactly what the drawer intends him to do, namely, endorse and cash it. *Robertson* v. *Coleman* (1886) 141 Mass. 231; *United States* v. *National Exchange Bank* (C. C. 1891) 45 Fed. 163; *Land T. & T. Co.* v. *Northwestern Bank* (1900) 196 Pa. St. 230. It is strongly urged against this view that in effect it merely legalizes forgery based on successful fraud, inasmuch as it is the true intent of the drawer to designate as payee the person named. *Tolman* v. *American Nat. Bank* (1901) 22 R. I. 462. However, assuming the jury to have found the drawer's intention to pass title to the person before him, it would seem that he is in no position to raise the question of forgery. See N. Y. Neg. Inst. Law, § 42. The second principal case, therefore, can be supported only on the ground that the paymaster did not rely upon the physical presence of the impostors, but handed out the checks simply in response to the calling of the assumed names.

HABEAS CORPUS—EXCESSIVE JUDGMENT—AVAILABILITY OF WRIT.—The defendant, having been convicted under separate counts of an indictment for offenses committed at the same time as part of a continuous criminal act, was sentenced to separate punishments. He satisfied his sentence for one offense and then sought relief by habeas corpus. *Held,* the writ should issue. *Stevens* v. *McClaughry* (C. C. A. 1913) 207 Fed. 18.

The writ of habeas corpus may not be used to perform the function of a writ of error, 1 Bailey, Habeas Corpus, § 33; *Harlan* v. *McGourin* (1910) 218 U. S. 442, for it is an extraordinary remedy lying only when the trial court has no color of jurisdiction or color of acquiring jurisdiction, 7 Columbia Law Rev. 288, and in favor of one restrained under a void as opposed to a voidable judgment. *Bray* v. *State* (1903) 140 Ala. 172. Since the court here had jurisdiction of the action and of the defendant, the excessive sentence may be considered, as has been held in a very similar case, *Moyer* v. *Anderson* (C. C. A. 1913) 203 Fed. 881, to be a mere legal error, resulting simply from the failure to charge the jury not to convict upon two counts. That the excessive punishment is unconstitutional, moreover, would apparently not aid the petitioner, under the holding of the Supreme Court which refused to release a prisoner held for violating an unconstitutional statute. *Glasgow* v. *Moyer* (1912) 225 U. S. 420. The weight of authority, however, in accord with the principal case, properly regards the excess of the sentence as totally void, being in fact beyond the jurisdiction of the court; *People ex rel. Tweed* v. *Liscomb* (1875) 60 N. Y. 559; *Munson* v. *McClaughry* (C. C. A. 1912) 198 Fed. 72; *Ex parte Lange* (1873) 18 Wall. 163; habeas corpus, therefore, particularly when the time for bringing a writ of error has passed, see *Bishop, Petitioner* (1898) 172 Mass. 35, is the prisoner's proper remedy.

HIGHWAYS—REGULATION BY MUNICIPALITY—RIGHTS OF ABUTTING LANDOWNERS.—The city of New York passed an ordinance providing for the establishment of public hack stands in front of certain hotels, where private stands had existed. *Held,* no rights are impaired by the abolition of the private stands, since the abutting owners cannot by contract grant any right inconsistent with the power of the local authorities to prescribe reasonable regulations for the use of the streets. *Yellow Taxi-Cab Co.* v. *Gaynor* (N. Y. 1913) 82 Misc. 94; affirmed, App. Div. #5064, N. Y. L. J., Dec. 13, 1913.

The city of Baltimore established a market in a public highway in front of the defendant's property, which interfered with his right of ingress and egress. *Held,* the ordinance was valid as an exercise of the power of the municipality to regulate public streets. *State* v. *Burkett* (Md. 1913) 87 Atl. 514.

Although, when a railroad acquires land by condemnation proceedings, the presumption is that the deed passed the fee, *Witt* v. *St. Paul & N. P. Ry.* (1888) 38 Minn. 122, when the city opens a right of way for a public highway the presumption is that the abutting owner retains the fee subject only to the easement in the public for highway purposes. *Cox* v. *Louisville R. R.* (1874) 48 Ind. 178; *Robert* v. *Sadler* (1887) 104 N. Y. 229. This presumption may be overcome, however, by an express grant of the fee, *Smith* v. *Street R. R.* (1889) 87 Tenn. 626, or by statute as in New York City where the city acquires the fee in trust that the street be kept open to the public. *Lahr* v. *Metropolitan El. Ry.* (1887) 104 N. Y. 268. Where the fee of the

public highway is in the abutting owner, if the city uses the street for other than strict highway purposes such owner can maintain trespass or ejectment for the additional burden imposed upon his land. *McCaffrey* v. *Smith* (N. Y. 1886) 41 Hun 117; *Matter of Rapid Transit R. R. Comm'rs* (1909) 197 N. Y. 81. When, however, the fee is in the city, as in the principal cases, the owner has no remedy unless the use of the street becomes a nuisance, *G. R. & I. R. R.* v. *Heisel* (1878) 38 Mich. 62, or interferes with his easement of light and air, *cf. Lahr* v. *Metropolitan El. Ry. supra,* or his right of ingress and egress. *Lamm* v. *St. P. M. & O. Ry.* (1890) 45 Minn. 71. In the first principal case, since the taxicab stands did not injure the abutting owner in any of these ways, the ordinance was properly upheld. In the second case, however, the owner's right of ingress and egress was materially impaired, and it is therefore submitted that the ordinance should have been declared invalid.

INTERSTATE COMMERCE—OPERA—SHERMAN ANTI-TRUST LAW.—In an action brought to enjoin the defendant from producing opera in New York in violation of a covenant not to give opera in New York or Boston, it was urged that the contract was void as violative of the Sherman Anti-Trust Law. *Held,* the giving of opera in different states is not interstate commerce. *Metropolitan Opera Co.* v. *Hammerstein* (N. Y. Sup. Ct.) N. Y. L. J., Dec. 8, 1913.

To come within the scope of the Sherman Act the contract must directly effect the restraint of commerce among the states; *Anderson* v. *United States* (1898) 171 U. S. 604; see *Williams* v. *Fears* (1900) 179 U. S. 270; the question, therefore, is whether the restraint is imposed upon an activity which actually did involve interstate commerce and not whether the enterprise might not have been so conducted as not to involve interstate commerce. Even though plays are not articles of trade, *People* v. *Klaw* (N. Y. 1907) 55 Misc. 72, and theatrical production is not a trading pursuit, *In re Oriental Society* (D. C. 1900) 104 Fed. 975, the fact remains that an essential element of the enterprise as the defendant actually conducted it prior to the contract in question did in fact require the transportation from one state to another of persons and goods. The analogy to be drawn from *Hoke* v. *United States* (1913) 227 U. S. 308 cannot be dismissed by the argument that the case was decided under the special authority of the "White Slave Act", for that act is valid only if the transportation of women, for whatever purpose, is interstate commerce. The situation, moreover, seems to come within the test laid down in a case which likewise did not involve a trading pursuit, *International Text Book Co.* v. *Pigg* (1910) 217 U. S. 91, that "importation from one state into another is the test of interstate commerce and every negotiation between citizens of different states which contemplates and causes such importation is a transaction of interstate commerce." That the defendant was, probably, both the consignor and consignee of his shipments will hardly be enough to take the case from the application of this rule. The case of *Cincinnatti Packet Co.* v. *Bay* (1906) 200 U. S. 179 seems distinguishable, for since the termini of the defendant's route were within the same state, the plaintiff's monopoly was plainly intended to extend only to that state; in the principal case, however, the parties evidently included two states within the scope of their agreement. Disregarding, then, the fact that the defendant might possibly have conducted his operation without making a single interstate ship-

ment, inasmuch as the normal course of his business did in fact require these shipments from New York to Boston, and since the direct effect of the contract was to prevent these shipments, the contract seems clearly to put a restraint on interstate commerce, and if the restraint is of the proscribed degree, it should come within the prohibition of the statute.

LANDLORD AND TENANT—COVENANT NOT TO ASSIGN—LIABILITY OF ASSIGNEE FOR RENT AFTER REASSIGNMENT.—The plaintiff leased to A who covenanted not to assign without the former's consent. A assigned to B with the consent of the plaintiff, subject to all covenants of the lease. Thereafter B assigned back to A without the consent of the plaintiff, who now sues B for rent accruing after the reassignment. *Held,* the defendant is not liable. *Meyer* v. *Alliance Investment Co.* (N. J. 1913) 87 Atl. 476.

Since the rule in Dumpor's Case, see 11 Columbia Law Rev. 627, is generally not applied to covenants, 1 Tiffany, Landlord & Tenant 946; but see *Seifke* v. *Koch* (N. Y. 1866) 31 How. Pr. 383, so as to discharge a covenant not to assign because there has once been an assignment with the consent of the lessor, the assignee would, of course, be liable for breach of that covenant in those jurisdictions where a covenant not to assign without consent runs with the land. 1 Tiffany, Landlord & Tenant 936; *McEacharn* v. *Colton,* L. R. [1902] App. Cas. 104. The suit in the principal case, however, was based not on breach of the covenant but on the failure to pay rent accruing after the reassignment. The case, therefore, falls within the normal rule that although a lessee is not discharged from the duty to pay rent by the assignment of the lease, 11 Columbia Law Rev. 271, nevertheless the liability of the assignee of the leasehold, being founded on privity of estate, *Paul* v. *Nurse* (1828) 8 Barn. & C. 486; *Salisbury* v. *Shirley* (1884) 66 Cal. 223, endures only so long as the privity continues, and hence terminates upon the assignment of the unexpired term to another. *Stern* v. *Florence Sewing Machine Co.* (N. Y. 1876) 53 How. Pr. 478. Of course, if the assignee expressly agrees with the lessor to perform the covenants in the lease, he would be liable for rents accruing even after the reassignment, *Consumer's Ice Co.* v. *Bixler & Co.* (1896) 84 Md. 437, and if such agreement is made with the assignor alone, recovery may be had in those jurisdictions where a third person is permitted to sue under a contract made for his benefit. *Wilson* v. *Lunt* (1898) 11 Colo. App. 56; *Springer* v. *De Wolf* (1902) 194 Ill. 218. It is well settled, however, that taking an assignment "subject to covenants" is not an assumption of them. *Dassori* v. *Zarek* (N. Y. 1902) 71 App. Div. 538; *Consolidated Coal Co.* v. *Peers* (1897) 166 Ill. 361.

LIBEL AND SLANDER—PRIVILEGE—REPORT OF JUDICIAL PROCEEDINGS.—The defendant published a full and fair account of a criminal proceeding before a magistrate, in which the latter had no jurisdiction of the accused. *Held,* the report was privileged. *Lee* v. *Brooklyn Union Pub. Co.* (1913) 209 N. Y. 245.

The principal case excuses the apparent injustice involved in privileging the report of a preliminary investigation before a magistrate, even though an utterly unfounded accusation is spread before the public, partly on the theory that since the proceeding was in open court, the defendant might properly report to the public what the public

itself had a right to witness. See *Stockdale* v. *Hansard* (1839) 9 A. & E. 1, 212. It is to be noted, however, that the privilege accorded on principles of public policy to one making an accusation to a magistrate is based on the exigencies of the occasion and does not extend to one who publishes it out of court. The privilege accorded to the latter is rather to be founded on the vital concern of the public in the proper administration of justice. See *Rex* v. *Wright* (1799) 8 D. & E. 293, 298. Thus, in spite of the fact that the public may examine the pleadings of the parties in the court room, a publication of their contents is not privileged until they have been presented for the determination of the court, since a perusal of them before that time throws no light on the administration of justice. See *Cowley* v. *Pulsifer* (1884) 137 Mass. 392; *Kimball* v. *Post Pub. Co.* (1908) 199 Mass. 248. Whenever, therefore, a properly constituted judicial tribunal takes any action, a fair report of its proceedings is privileged, *Kimber* v. *Press Assn.*, L. R. [1893] 1 Q. B. 65, if the public has a legitimate interest therein and the publisher is not actuated by malice. And it would seem that where a magistrate is empowered to enter upon an inquiry, even if he determines that the case is not a proper one for the exercise of his jurisdiction, inasmuch as he had jurisdiction to determine that very fact, the proceeding is judicial. *Beiser* v. *Scripps-McRae Pub. Co.* (1902) 113 Ky. 383; but see *Byers* v. *Meridian Print. Co.* (1911) 84 Oh. St. 408.

MUNICIPAL CORPORATIONS—ENFORCEMENT OF SPECIAL ASSESSMENT AGAINST RAILROAD RIGHT OF WAY.—The defendant city levied a special assessment for a street improvement against a portion of the plaintiff's right of way, and sought to enforce the assessment by sale of the property. To the plaintiff's bill to restrain the sale, defendant demurred. *Held,* the demurrer could be overruled. *City of Decatur* v. *Southern Ry.* (Ala. 1913) 62 So. 855. See Notes, p. 61.

MUTUAL BENEFIT ASSOCIATIONS—WRONGFUL EXPULSION OF MEMBER—ACTION FOR DAMAGES.—The plaintiff alleged that he had been wrongfully expelled from membership in a mutual benefit society. *Held,* that he might sue for damages and was not remitted to mandamus to compel reinstatement. *D'Aloia* v. *Unione Fratellanza Italiana* (N. J. 1913) 87 Atl. 472.

In England a member of a beneficial association is refused damages for his wrongful expulsion, on the theory that since the disfranchisement was void, he has suffered no injury. *Wood* v. *Wood* (1874) L. R. 9 Ex. 190; but see *Benson* v. *Screwmen's Benevolent Assn.* (1893) 2 Tex. Civ. App. 66. The same result was obtained by the Supreme Court of Rhode Island on the ground that the demand for damages instead of for reinstatement by mandamus was a waiver of the wrong; *Lavalle* v. *Soc. St. Jean Baptiste* (1892) 17 R. I. 680; the court also pleaded the difficulty of ascertaining the amount of damages. The weight of authority, however, supports the principal case in granting a wrongfully disfranchised member the right to recover actual damages commensurate with the extent of his injury, *Thompson* v. *Grand International Brotherhood* (1905) 41 Tex. Civ. App. 176, on the theory that he has been unlawfully deprived of property rights. *Ludowiski* v. *Benevolent Society* (1888) 29 Mo. App. 337; *Washington Beneficial Society* v. *Bacher* (1853) 20 Pa. 425. Moreover, he need not first exhaust his remedies within the organization, *Thompson* v. *Grand*

International Brotherhood, supra; Malmsted v. *Minneapolis Aerie* (1910) 111 Minn. 119; but see *Blumenfeld* v. *Korschyck* (1891) 43 Ill. App. 434, unless he has expressly agreed to do so. *Ocean Castle* v. *Smith* (1896) 58 N. J. L. 545; see 13 Columbia Law Rev. 752. While the bringing of an action for damages has been held a waiver of the right to mandamus, *Ohio* v. *Lipa* (1876) 28 Oh. St. 665, a member restored by mandamus has nevertheless been subsequently granted damages for the expulsion. *Merschiem* v. *Musical Mut. Protective Union* (N. Y. 1890) 24 Abb. N. C. 252. Clearly, therefore, the plaintiff is not remitted to mandamus, but has an election of remedies. *Ellis* v. *Alta Friendly Soc.* (1901) 16 Pa. Sup. Ct. 607; 2 Bacon, Benefit Societies (3rd ed.) § 442.

NEGOTIABLE INSTRUMENTS—CONFESSION OF JUDGMENT—SUBSEQUENT HOLDER.—A promissory note contained a power of attorney to confess judgment, without specifying in whose favor the confession could be made. *Held,* the power was effective in favor of an indorsee. *Jarrett* v. *Sippely* (Mo. 1913) 157 S. W. 975.

Inasmuch as a power of attorney is not negotiable, it was the ancient rule that a note which contained a warrant of attorney to confess judgment was thereby rendered non-negotiable. *Overton* v. *Tyler* (1846) 3 Pa. 346. Later cases, however, have regarded the power of attorney as distinct from the instrument and of no effect upon its negotiability, *Clements* v. *Hull* (1878) 35 Oh. St. 141, and this view is now embodied in the Uniform Neg. Inst. Law § 5 (2); N. Y. Neg. Inst. Law § 24 (2). Moreover, it is now well established that when the maker clearly confers the authority to confess judgment in favor of any holder, such authority can be invoked in favor of a transferee. *Clements* v. *Hull, supra; Vennum* v. *Mertens* (1906) 119 Mo. App. 461. But when the warrant of attorney either names the payee or, as in the principal case, fails to specify in whose favor the confession may be made, some courts have been unwilling to interpret the intention of the maker as extending to subsequent holders, and have consequently held that any such authority is extinguished by the transfer of the note. *Rasmussen* v. *Hagler* (1906) 15 N. Dak. 542; *Spence* v. *Emmerine* (1889) 46 Oh. St. 433; *contra, Shepherd* v. *Wood* (1897) 73 Ill. App. 486. These decisions are predicated on the well established rule of agency that a warrant of attorney must be strictly construed. Story, Agency, § 68; see *Manufacturers' Bank* v. *St. John* (N. Y. 1843) 5 Hill 497. It would seem, however, that in the absence of any express designation of the payee, the intention of the maker to authorize the confession in favor of an indorsee is sufficiently plain to justify the conclusion reached in the principal case. *Shepherd* v. *Wood, supra.*

OFFICERS—CONTRACTS WITH THE STATE—RECOVERY ON QUANTUM MERUIT.—The plaintiff corporation, of which N was president, sued the state to recover on a contract entered into while N was state senator. The state constitution forbade any member of the legislature to be interested, directly or indirectly, in any contracts entered into with the state, and made all such unauthorized contracts void. *Held,* recovery denied, either on the express contract or on a *quantum meruit. Norbeck & Nicholson Co.* v. *State* (S. Dak. 1913) 142 N. W. 847.

Although, in the absence of statute, the contract of an officer with a state or municipality is not void in its essence, *Smith* v. *Dandridge*

(1911) 98 Ark. 38, it is rendered voidable by the situation of the parties, *Concordia* v. *Hagaman* (1895) 1 Kan. App. 35; *cf. Smith* v. *Albany* (1875) 61 N. Y. 444; *contra, Albright* v. *Chester* (S. Car. 1856) 9 Rich. L. 399, and this rule is equally applicable where the officer would become a beneficiary under the contract, by occupying the status of stockholder or director in the contracting corporation. *San Diego* v. *San Diego etc. R. R.* (1872) 44 Cal. 106. But, since the thing contracted for is not in itself illegal, the contractor, in the absence of fraud, see *Niles* v. *Muzzy* (1875) 33 Mich. 61, is allowed a recovery in *quantum meruit,* where the government has been benefited at his expense, *Smith* v. *Dandridge, supra,* under the unwarranted assumption that the contract has been ratified, and this notwithstanding the fact that the contractor is presumed to know the law and therefore to have contracted at his peril. Under such statutes as are construed as merely expounding the common law, the results reached have been much the same. *Grand Island Gas Co.* v. *West* (1890) 28 Neb. 852; see *Diver* v. *Keokuk Savings Bank* (1905) 126 Ia. 691. Where, however, the statute is penal, *Dallas* v. *Sea Island City* (N. J. L. 1913) 87 Atl. 467, or makes the contract void, as in the principal case, the thing contracted for is itself against public policy, see *Pickett* v. *School District* (1870) 25 Wis. 551, 558, and the contractor is refused protection or relief. *McCarthy* v. *Bloomington* (1906) 127 Ill. App. 215; *cf. McNay* v. *Lowell* (1908) 41 Ind. App. 627; see 4 Columbia Law Rev. 379.

PARENT AND CHILD—HABEAS CORPUS FOR CUSTODY OF CHILD—RES ADJUDICATA.—The plaintiff, having unsuccessfully sued out a writ of habeas corpus for the custody of her child, who had formerly been entrusted to the defendant upon a decree of divorce, makes another application for the writ. *Held,* the decision on one writ for custody is *res adjudicata* and precludes the issuance of a second writ upon the same state of facts. *Knapp* v. *Tolan* (N. Dak. 1913) 142 N. W. 915.

The respondent, who had been appointed guardian of the infants in controversy by the probate court of St. Louis, having obtained a writ of habeas corpus against the present petitioner, was awarded their custody. Petitioner now applies for a writ. *Held, res adjudicata* applies until the condition of the person whose status is in question is changed. *In re Breck* (Mo. 1913) 158 S. W. 843. See Notes, p. 77.

PROCESS—MISNOMER OF DEFENDANT—JURISDICTION.—In an action against A. S. Deleplane, the only service was by publication addressed to A. L. Deleplane. *Held,* on a collateral attack, no jurisdiction had been obtained over the defendant. *Gibson* v. *Foster* (Colo. App. 1913) 135 Pac. 121.

It seems to be settled in New York that where misnamed process is served personally, jurisdiction is acquired only if the summons fairly apprises the party served that the action is against him. *Stuyvesant* v. *Weil* (1901) 167 N. Y. 421; *Schoellkopf* v. *Ohmeis* (N. Y. 1895) 11 Misc. 253; but see *Whittlesey* v. *Frantz* (1878) 74 N. Y. 456; Code of Civil Procedure § 1777. The almost universal rule, however, is that if a summons is personally served upon the party intended, the court has jurisdiction no matter how great the misnomer. *Langmaid* v. *Puffer* (1856) 73 Mass. 378; *First Nat. Bank* v. *Jaggers* (1869) 31 Md. 38; *Jones* v. *Union Pac. R. R.* (1909) 84 Neb. 121; *contra, Neil-Millard Co.* v. *Owens* (1902) 115 Ga. 959. This rule, which embodies the

practice at common law, Chitty, Pleading *467; *Smith* v. *Patten* (1815) 6 Taunt. 115, declining to follow *Cole* v. *Hindson* (1795) 6 T. R. 234, seems more in accord with principle, since the name is only one means of identification. *Robertson* v. *Coleman* (1886) 141 Mass. 231. In the case of constructive service, however, the defendant, even should he see the misnamed summons, would not have the same reason for believing himself to be the party intended. The cases generally, therefore, require that the name used should so far resemble the true name that the defendant, should he see it, would be fairly apprised of the action against him: *White* v. *Lumber Co.* (1912) 240 Mo. 14: this rule is often applied by the much vexed *idem sonans* test, *Puckett* v. *Hetzer* (1910) 82 Kan. 726, although it would seem that in this class of cases the appearance of the name should be at least as important as its sound. See *Kelly* v. *Kuhnhausen* (1908) 51 Wash. 193. It is usually held that an error in the middle initial is immaterial; *Collins* v. *Board of Supervisors* (Ia. 1912) 138 N. W. 1095; *Johnson* v. *Day* (1891) 2 N. Dak. 295; but it would seem that should the mistake have a tendency to mislead, the technical rule that such initial is no part of a name, but see *Terry* v. *Sisson* (1878) 125 Mass. 560, ought not to govern. See *D'Autremont* v. *Anderson Co.* (1908) 104 Minn. 165.

RELEASE—REPUTATION FOR FRAUD—NECESSITY OF TENDER OF CONSIDERATION.—To a plea of compromise and settlement, the plaintiff replied that the compromise had been procured by the defendant's fraudulent representations as to his solvency. *Held,* the reply was bad, as it did not allege a return or tender of the money received in settlement. *Putnam* v. *Boyer* (Mo. App. 1913) 158 S. W. 861.

Since a defrauded party to a contract is not entitled to rescind without tendering back the consideration he has received, see 8 Columbia Law Rev. 123, there seems to be no logical reason why tender should not be equally a condition precedent to a legal action based on repudiation of a fraudulent release. *Gould* v. *Cayuga Nat. Bank* (1881) 86 N. Y. 75; *Drohan* v. *Lake Shore etc. Ry.* (1894) 162 Mass. 435; *Jordy* v. *Dunlevie* (Ga. 1913) 77 S. E. 162. But if the fraud was such as to prevent the plaintiff's mind from following his act, it is usually held that since the release is void and not merely voidable, there is nothing to rescind and no tender is required. *Herman* v. *Fitzgibbons Boiler Co.* (N. Y. 1910) 136 App. Div. 286; *Michalsky* v. *Centennial Brewing Co.* (Mont. 1913) 134 Pac. 307. A few cases, however, go to extremes to hold such releases merely voidable, and require tender. See *Heck* v. *Mo. Pac. Ry.* (C. C. 1906) 147 Fed. 775; *Western Ry.* v. *Burke* (1895) 97 Ga. 560; *Birmingham Ry.* v. *Jordan* (1910) 170 Ala. 530. Some cases which hold tender unnecessary are distinguishable on the ground either that it is clear from the circumstances that a tender would not have been accepted, *Woods* v. *Wikstrom* (Ore. 1913) 135 Pac. 192; see *Carroll* v. *United Railways Co.* (1911) 157 Mo. App. 247, or that the money received for the release was concededly due upon the original claim, and consequently no injustice resulted from merely setting it off against such claim. See *Pierce* v. *Wood* (1851) 23 N. H. 519; *Kley* v. *Healy* (1891) 127 N. Y. 555. But there is a well-defined line of decisions denying the necessity of tender in any of these cases. *St. Louis R. R.* v. *Richards* (1909) 23 Okla. 256; *Sanford* v. *Royal Ins. Co.* (1895) 11 Wash. 653. Although this result leaves the defendant unprotected should he owe less upon the unliquidated original liability than he paid for the release,

it is not likely to produce injustice; for if the release was procured fairly, it would be a complete defense; if, on the other hand, it was induced by fraud, the defendant is entitled to little consideration, particularly since the consideration in such a case was probably grossly inadequate.

SALES—TRANSFER OF TITLE—WEIGHING OF GOODS TO ASCERTAIN PRICE.—The plaintiff sold wheat to M at a fixed price per bushel, the total price to be determined by weight taken after delivery. M sold to the defendant and became insolvent before the weighing was done. *Held,* the passing of title was not conditional upon the weight's being ascertained. *Welch Co.* v. *Lahart Elevator Co.* (Minn. 1913) 142 N. W. 828.

Where the parties have failed to disclose their intention, there is no presumption that they desire to postpone the passing of title because the stipulation is for future delivery of specific goods in a deliverable state. Burdick, Sales (3rd ed.) § 91. Such a presumption, however, is raised when the seller engaged to do something to the goods to put them in such condition, Blackburn, Sales (2nd ed.) 175; *The Elgee Cotton Cases* (1874) 22 Wall. 180, and title will not be transferred until the stated condition is performed. *Semple* v. *Lumber Co.* (1909) 142 Ia. 586; *Wesoloski* v. *Wysoski* (1904) 186 Mass. 495. This principle is particularly applicable where the agreement is for the sale of goods which must of necessity be weighed, measured, or tested for the purpose of identification, since the act is necessary to ascertain the subject matter. *Rosenthal Bros.* v. *Kahn Bros.* (1890) 19 Ore. 571; *Frost* v. *Woodruff* (1870) 54 Ill. 155. But this presumption is not conclusive. *Byles* v. *Colier* (1884) 54 Mich. 1. Where, however, as in the principal case, the goods are ascertained, and the act to be performed is only for the purpose of determining the total price to be paid under the contract, there would seem to be no justification for holding that the title would not pass at once, *Fiddyment* v. *Johnson* (1912) 18 Cal. App. 339; *Sanger* v. *Waterbury* (1889) 16 N. Y. 371; *cf. Nicholson* v. *Taylor* (1858) 31 Pa. 128, and the conclusion reached by the court is supported not only by the weight of authority, but by the Uniform Sales Act. N. Y. Pers. Prop. Law § 100.

TRANSFER TAX—DEPOSIT UNDER TWO NAMES—GIFTS INTER VIVOS.—Decedent deposited money to the account of herself and husband as joint owners, giving either party the right to draw it out, the survivor to take all. Before her death, the husband at her request drew out a portion of this sum for his own use. *Held,* the transfer tax may be assessed only upon the residue. *In re Von Bernuth's Estate* (Surr. Ct. 1913) 143 N. Y. Supp. 672.

It seems clear that the appropriation of part of the fund by the husband was a gift *inter vivos,* not made in contemplation of death and hence not subject to the transfer tax. For the principles applicable to the proposition that the sum subject to joint ownership comes within the provisions of the Tax Law, see 13 Columbia Law Rev. 657.

VENDOR AND PURCHASER—VENDOR'S LIEN—NEGOTIATION OF LIEN NOTES.—A grantor of land, who had received as consideration a series of notes which were a lien on the land, endorsed several of them without recourse, stating that they were a prior incumbrance on the land. *Held,* the notes so transferred are entitled to a prior lien. *Martin* v. *Gray* (Tex. 1913) 159 S. W. 118.

Since a grantor of land who indorses notes given in consideration of the conveyance is liable upon his indorsement, the indorsee is subrogated to the vendor's lien in order to avoid circuity of action; *Preston* v. *Ellington* (1883) 74 Ala. 133; and if the vendor indorses some of a number of such notes, the same reason makes the transferee's lien prior to that of the vendor. *Walcott* v. *Carpenter* (Tex. 1911) 132 S. W. 981. But when such a note is assigned, or indorsed without recourse, it is apparent that no liability of the vendor attaches, and consequently that his interest in the land, as security for that particular note, ceases. Therefore, on the theory that the lien was created by Chancery exclusively for the benefit of the vendor, but see 13 Columbia Law Rev. 450, it is generally held that such an indorsement without recourse does not carry with it a lien in favor of the indorsee. *Johnson* v. *Nunnerly* (1875) 30 Ark. 153; *Bankhead* v. *Owen* (1877) 60 Ala. 457; see *Smith* v. *Smith* (N. Y. 1870) 9 Abb. Pr. [N. S.] 420; but see Cal. Civil Code § 3047; N. & S. Dak. Civil Code § 1802. A strict adherence to this doctrine is probably due to an attitude of the courts that, inasmuch as a vendor has already adequate protection by reason of his right to resort to attachment proceedings, or to demand a mortgage at the time of the conveyance, this lien is to be restricted to its narrowest limits and to be considered as a "bare right to file a bill". See 9 Columbia Law Rev. 261. The departure from the general rule in the principal case is due to a precedent established by an earlier case in the same jurisdiction, *Neese* v. *Riley* (1890) 77 Tex. 348, through a failure to distinguish between the case where the vendor retains the title as security, and a situation like that in the principal case, where the title was actually conveyed. See *Davidson* v. *Allen* (1858) 36 Miss. 419. If, moreover, such an indorsement is incapable of passing the lien, it is not apparent how the indorser's representation could effect that result by estoppel.

WILLS—BEQUEST TO CREDITOR—SATISFACTION OF DEBT.—By suppressing a will, an heir acquired the entire estate, including a legacy to the plaintiff; the heir died, giving a legacy to the plaintiff greater than that in the original will. *Held,* in the absence of a contrary intention, the legacy must be deemed a satisfaction of the obligation. *Pitts* v. *Van Orden* (Tex. 1913) 158 S. W. 1043.

In construing the intention of the testator, a legacy, in the absence of evidence to the contrary, should be regarded as a bounty. The rule of the principal case, that a legacy to a creditor is presumed to be in payment of the debt, provided that the debt was contracted before the making of the will and that the legacy is as great as, or greater than the debt, *Talbott* v. *Duke of Shrewsbury* (1714) Prec. Ch. 394; Gardner, Wills, 571, originated in early chancery cases where the obligation was not strictly enforcible, and where one gratuity might be balanced against another. *Fowler* v. *Fowler* (1735) 3 P. Wms. *353; 2 Redfield, Wills, *185 *et seq.* Its subsequent application to debts in general led to great confusion and injustice, see *Eaton* v. *Benton* (N. Y. 1842) 2 Hill 576, so that the courts came to regard it with dissatisfaction, and seized upon the slightest circumstances to take cases without the rule. *Richardson* v. *Greese* (1743) 3 Atk. *65; 2 Williams, Executors, *1163 *et seq.* The exceptions are now so numerous, and modern decisions squarely supporting this fallacious presumption so few, that it may fairly be deemed extinct; see *German* v. *German* (Tenn. 1869) 7 Cold. 180; *Sheldon* v. *Sheldon* (1892) 133 N. Y. 1;

Williams v. *Crary* (N. Y. 1830) 4 Wend. 443; and one state at least has abolished it by statute. Rev. Civ. Code La., Art. 1641; see *Succession of Jackson* (1895) 47 La. Ann. 1089. However, even if the rule nominally survives, upon the court's assumption that the testator in the principal case occupied the position of trustee toward the plaintiff, the court erred, for an exception obtains in the case of trust funds. *Taylor* v. *Taylor* (1858) 4 Jur. [N. S.] 1218; see *Thompson* v. *Wilson* (1898) 82 Ill. App. 29.

WILLS—CONSTRUCTION—PRECATORY TRUSTS.—The testator provided that the income from the residue of his estate was to be paid to his widow "for the support of herself and the maintenance and education of her children." *Held,* the income was impressed with a trust for the purposes named, and any amount above that so needed was the widow's own property. *Johnson* v. *Johnson* (Mass. 1913) 102 N. E. 465.

It has long been settled that words of request, entreaty, or recommendation addressed to a legatee or devisee are sufficient to make the latter a trustee for the person in whose favor the words are used, 1 Jarman, Wills (6th ed.) 868, but it is a prerequisite that the subject matter and object of the intended trust shall be pointed out with sufficient clearness. *Reeves* v. *Baker* (1854) 18 Beav. 372; see *Hood* v. *Oglander* (1865) 34 Beav. 513. The intention of the testator may be so strongly expressed as to impress upon the gift an absolute trust for the ultimate beneficiaries, depriving the donee of any beneficial interest over and above the purposes of the trust. *Blakeney* v. *Blakeney* (1833) 6 Sim. 52; *Cole* v. *Littlefield* (1853) 35 Me. 439. A bequest like that in the principal case, however, is not considered as coming within that class, but presents, rather, the question whether the words express merely the motive of the testator, or whether they impose the obligation to devote so much of the bequest as shall be reasonably necessary to the purposes declared. There are cases giving such clauses the former interpretation, *Seamonds* v. *Hodge* (1892) 36 W. Va. 304; *McCroan* v. *Pope* (1850) 17 Ala. 612; *cf. Benson* v. *Whittham* (1831) 5 Sim. 22, but the justice of giving the children a right which they are entitled to enforce leads most courts to the latter construction. *Cowman* v. *Harrison* (1852) 10 Hare 234; *Hora* v. *Hora* (1863) 33 Beav. 88. In such case, the donee is entitled to an exercise of discretion, subject to review by the court, as to what expenditures are necessary for the purposes of the trust, *cf. Cole* v. *Littlefield, supra,* and if these purposes are satisfied he need not account for the surplus. *Hora* v. *Hora, supra.*

WILLS—JOINT AND MUTUAL WILL BINDING UPON SURVIVOR.—A husband and wife made a joint and mutual will which the former, as survivor, probated. He subsequently made other disposition by gift of a portion of the property received from wife's estate, and, by a later will, of his individual property. The beneficiaries seek to enforce in equity the provisions of the joint will against the donee and the executor of the second will. *Held,* two judges dissenting, the decree should issue. *Rastetter* v. *Hoenninger* (N. Y. 1913) 157 App. Div. 553.

The early cases pronounced against the joint will as unknown to testamentary law on the ground of its seeming irrevocability, 1 Williams, Executors (6th Amer. ed.) 12; *Hobson* v. *Blackburn* (1822) 1 Addams' Eccl. 274; see *Earl of Darlington* v. *Pulteney* (1775) 1 Cowp. 260, 268, and in some jurisdictions a joint will is prohibited by

statute. La. Rev. Civil Code (1908) Art. 1572; Porto Rico Civil Code (1911) § 677. The later and better judicial opinion, however, which for purposes of probate considers simply the intention to make a will and the compliance with the forms of testamentary disposition, treats it as capable of probate upon the death of each testator, as his separate will. *Hill* v. *Harding* (1891) 92 Ky. 76; *In re Davis' Will* (1897) 120 N. C. 9. The apparent conflict of authority would seem to be due to a failure to distinguish between the essential revocability of the instrument as a will, and the obligation imposed by the contractual intention of the testators. The weight of authority is to the effect that as a will, it is revocable by either party at his option. *Schumaker* v. *Schmidt* (1870) 44 Ala. 454; *Cawley's Estate* (1890) 136 Pa. 628. If made in compliance with a contract it is still revocable as a will, Page, Wills, § 69; *cf. Matter of Gloucester* (1890) 32 N. Y. St. 901, but may be enforced in equity, the document being sufficient evidence to establish the contract. *Rastetter* v. *Hoenninger* (N. Y. 1912) 151 App. Div. 853; *Frazier* v. *Patterson* (1909) 243 Ill. 80; *contra, Wyche* v. *Clappe* (1875) 43 Tex. 543. This antecedent contract obligation assumed by him, and his acceptance of benefits after probate, was properly held to have imposed a trust upon the husband's entire estate, upon his individual property as well as upon the property received by his wife's will. *Bower* v. *Daniel* (1906) 198 Mo. 289.

WILLS—LEGACIES OF STOCK—SPECIFIC, GENERAL AND DEMONSTRATIVE.—The testator made several bequests of "my preferred stock in the J. L. Prescott Co." At the date of the will he owned such shares in excess of the total number bequeathed, but before his death he had exchanged most of them for first mortgage bonds of the same company. *Held,* the legacies were demonstrative, and the legatees were entitled to the value of the stock payable in the bonds. *Spinney* v. *Eaton* (Me. 1913) 87 Atl. 378.

The amount due on a specified bond and mortgage was bequeathed in trust. After the date of the will, the testatrix cancelled the mortgage and mingled the proceeds with other funds. *Held,* it was a specific legacy and was therefore adeemed. *In re Bouk's Estate* (Surr. Ct. 1913) 141 N. Y. Supp. 922. See Notes, p. 74.